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Supreme Court of the United States

OCTOBER TERM, 1963

No. 768

LONNIE H. STONE,

Petitioner,

versus.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

S. GUNTER TONEY
212 East Jefferson Street
Tallahassee, Florida.
Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Lonnie H. Stone, by his attorney, S. Gunter Toney, presents this, his Petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW.

The District Court entered judgment and imposed sentence but did not deliver an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is included in the certified transcript of the record filed herewith (R. 110).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Petitioner seeks to have reviewed a Judgment of the United States Court of Appeals, Fifth Circuit, dated the 13th. day of November, 1963, affirming the Judgment and Sentente of the United States District Court for the Northern District of Florida, Marianna Division, on appeal included in the certified transcript of the record filed herewith (R. 119).

The Petitioner filed a Petition for Rehearing with the United States Court of Appeals, Fifth Circuit, on the 3rd. day of December 1963 (R. 120).

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals, Fifth Circuit, is 62 Statutes 928. (June 25, 1948, Chapter 646).

QUESTION PRESENTED FOR REVIEW.

The point relied on by the Petitioner for granting of the Writ of Certiorari, is as follows:

The Trial Court's blanket order prohibiting publication of the names of petit jurors until the morning of the opening day of the term, its refusal to allow petitioner to inspect the summons issued to the Marshal on file in the office of the Clerk, a public document, its denial of petitioner's motion for a single days postponement for the purpose of checking the juror's qualifications were severally and

collectively discriminatory and denial of due process of law in violation of petitioner's rights under the Fifth Amendment of The Constitution of The United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES AND RULES INVOLVED.

1. 18 U. S. C. A. Sec. 3432 provides:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

2. 28 U. S. C. A. Sec. 1864 provides in pertinent part:

"The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing . . ."

3. 28 U. S. C. A. Sec. 1867 provides in pertinent part:

"When the court orders a grand or petit jury to be drawn the clerk shall issue summons for the required number of jurors and deliver them to the marshal for service . . ."

". . . Such service shall be made by the marshal who shall attach to his return the addressee's receipt for the registered summons, where service is made by mail."

4. Rule 24 (b) of the Federal Rules of Criminal Procedure provides in pertinent part:

"(b) Peremptory Challenges . . . If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges . . ."

STATEMENT OF THE CASE.

The petitioner was indicted on January 30, 1961 at Tallahassee, Florida, and charged in a three count indictment. Count One charged unlawful possession of a still or distilling apparatus. Count Two charged that he did unlawfully make or ferment mash fit for distillation or for the production of distilled spirits. Count Three charged possession of non-tax paid distilled spirits, (R. 3-4).

On November 29, 1962, four days prior to the commencement of the second trial of the cause, petitioner filed his Motion For Leave to Inspect the List of Petit Jurors in the office of the Clerk of the Court and in the alternative sought postponement of his trial to a date subsequent to the opening day of the term or a date subsequent to December 3, 1962

(R. 18-19). The basis for this Motion was the refusal of the Clerk to allow inspection of the Jury List and the Court's blanket order prohibiting publication of the Jury List until the morning of the opening day of the term, (R. 19). The Court denied said Motion (R. 20).

On December 3, 1962, the opening day of the term, petitioner's case was called for trial at which time his counsel announced that he was not ready for trial for the same reasons set forth in his motion to inspect the Jury List. (R. 37). Thereafter, at a bench conference, out of the presence of the jury, counsel for petitioner announced for the record that he had received a copy of the Jury List at 8:25 A.M. on the day that the case was called for trial. The Court reprimanded counsel for protecting the record and threatened him with contempt of Court (R. 79).

ARGUMENT.

The Trial Court's blanket order prohibiting publication of the names of petit jurors until the morning of the opening day of the Term, its refusal to allow petitioner to inspect the summons issued to the Marshal on file in the office of the Clerk, a public document, its denial of petitioner's motion for a single days postponement for the purpose of checking the jurors' qualifications were severally and collectively discriminatory and denial of due process of law in violation of petitioner's rights under the Fifth Amendment to The Constitution of The United States.

Seven days prior to trial petitioner made a request of the Deputy Clerk, Marianna Division of the lower court, to inspect the list of Petit Jurors summoned for the term of Court commencing on December 3, 1962. Petitioner was advised by the Deputy Clerk that the Jury had been drawn and

summoned, but refused to allow the requested inspection. The Deputy Clerk further advised petitioner that the Court had issued a blanket order prohibiting publication of the Jury List until the morning of the opening day of the term, that is, Monday, December 3, 1962 (R. 18-19).

On Thursday, November 29, 1962, Petitioner filed his Motion For Leave to Inspect the Marshal's Return of Service of the jurors in the Office of the Clerk of the trial court and in the alternative sought a postponement of trial for at least one day subsequent to the opening day of the term (R 18-19). The Court denied each aspect of this Motion and referred to its Directive of December 4, 1961 and its Order of November 29, 1962 (the date of the Order Denying this Motion) formally adopting the practice of prohibiting publication of the Jury List (R. 20).

On December 3, 1962, the opening day of the term, at 8:25 A.M. petitioner received a copy of the list of jurors (R. 79). Shortly thereafter petitioner's case was called for trial (the first case of the day) at which time petitioner announced that he was not ready for trial for the same reasons set forth in his Motion to Inspect the List of Jurors (R. 37).

Title 28 U.S.C.A., Sec. 1864, requires that the names of Grand and Petit Jurors shall be *publicly drawn* from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

Title 18 U.S.C.A., Sec. 1867, requires the United States District Clerk to issue summons for the required number of jurors and deliver same to the Marshal for service. The United States Marshal is required to file his return of the jurors served in the Clerk's Office.

It is submitted that the trial judge abused his discretion in issuing blanket orders prohibiting petitioner and other members of the public from viewing a public record in the files of a governmental agency. Petitioner contends that Congress did not intend that the jury summons and Marshal's return be stamped "top secret" or "confidential". Title 28 U.S.C.A., Sec. 1864 requires that the names of grand jurors and petit jurors shall be *publicly drawn*.

An accused tried on the second, third or subsequent day of the term in the Northern District of Florida has access to the jury list from the first day of the term. It is only the defendant who must face the jury within one to two hours after receiving the list of jurors on the first day of the term that is placed at a disadvantage. Clearly, the blanket order in this case, is discriminatory. It is readily apparent that the blanket order, the trial court's denial of defendant's right to inspect the summons and return prior to trial and the Defendant's Motion for a single day postponement severally and collectively constituted an abuse of discretion.

No worthwhile purpose may be served in clamping the lid of secrecy on the jurors publicly drawn from the box in accordance with Title 28 U.S.C.A., Sec. 1864. Anyone may attend this drawing and copy the names of those drawn. That the Statute requires that the jurors be publicly drawn is not open to doubt, *Wilson v. United States*, 5th. Cir. 104 F. 2d 81; *Hammerschmidt v. United States*. 287 Fed. 817; *United States v. Standard Oil Co.*, D.C. Ind., 165 F. Supp. 359.

The great benefit to a defendant in civil and criminal cases of conducting a pre-trial investigation of the prospective jurors is recognized by all practicing lawyers. In important cases credit reports on each prospective juror are often obtained. Information such as religion, nationality, place of

birth, and criminal records, which is of a delicate nature and a source of embarrassment to the jurors if sought on voir dire, are extremely helpful in determining the desirability of jurors. This information is of inestimable value in exercising the right to challenge either for cause or peremptorily.

Title 18 U.S.C. Sec. 3432 requires:

> "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen . . ."

This Statute has been construed to not entitle the Clerk of the Court to fees for furnishing copies of Jury Lists in cases where the Defendant was charged an offense less than capital. This Court held in the case of *United States v. Van Duzee*, 140 U. S. 169, 11 S. Ct. 758 that in cases, not capital, the prisoner is not entitled to a list of witnesses and jurors at government expense. Lower federal courts have applied this construction of the statute. *United States v. Wood*, 28 Fed. Cases 754, 755. *Shelp v. United States*, 9th. Cir., 81 Fed. 694.

In the case of *Wilson v. United States*, 5th. Cir., 104 F. 2d 81 the Court held that the Defendant charged with a non-capital offense was not, as a matter of right, entitled to receive the list of jurors prior to the day of trial and further held that the time at which defendants may be given a jury list is left to the sound discretion of the trial court citing *United States v. Van Duzee, supra.* In the *Wilson* case the Court approved of the trial court passing the case over one day to permit counsel to check the qualification of the jurors.

In the case at bar, petitioner avoided asking for a list of the jurors to be furnished at government expense. He sought to inspect a public record (Marshal's return and summons) in the Office of the Clerk of the Court.

No case has been discovered where this Court has ruled upon the question of the rights of an accused to view the public record containing the names of petit jurors, publicly drawn, in advance of trial. This Court in the case of *United States v. Van Duzee*, 140 U.S. 169, 11 S. Ct. 758, a case where a district clerk sought fees for furnishing a list of witnesses and jurors to an accused charged with an offense less than treason or other capital offense, held that the prisoner was not entitled to a list of witnesses and jurors at government expense.

The lower appellate courts have cited the Duzee case as authority for holdings that defendants charged with non-capital offenses were not, as a matter of right, entitled to *receive the list of jurors* prior to the day of trial. *Wilson v. United States*, 5th Cir. 1939, 104 F. 2d 81, cert. den. 308 U.S. 574, 60 S. Ct. 89; *Spivey v. United States*, 5th Cir. 1940, 109 F. 2d 181, cert. den. 310 U.S. 631, 60 S. Ct. 1079; *Hamer v. United States*, 9th Cir. 1958, 259 F. 2d 274, 279, cert. den. 359 U.S. 916, 79 S. Ct. 592; *Wagner v. United States*, 9th Cir. 1959, 264 F. 2d 524.

It is submitted that the Duzee case and the lower court cases cited hereinabove are all distinguishable on the facts from the case at bar. Here petitioner sought to view a public record in the office of the district court clerk; he did not seek a list of jurors at government expense.

The letter directive or blanket order of the trial judge, prohibiting disclosure or publication of the names of jurors

drawn for service, was apparently designed to avoid possible violation of obstruction of justice statutes and abuse of prospective jurors (R. 111).

It is submitted that the blanket order is a reflection upon the jury commissioners and the jurors. The implication is clear that the commissioners may possibly select jurors who would be susceptible to pressure and that the jurors would not report attempts of corruption to the trial court.

The appropriate remedy and deterrent to jury tampering is the existence of and prosecution under the obstruction of justice statutes.

The trial court's attempt to remedy a possible wrong—jury tampering—by stamping as top secret a public record which is designed for the protection of all citizens including the accused, constituted a denial of due process of law in violation of petitioner's rights under the Fifth Amendment to the Constitution of the United States.

PRAYER.

WHEREFORE, Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court consider the certified Transcript of Record filed herewith and on hearing, the Judgment of the United States Court of Appeal, Fifth Circuit, affirming the Judgment and Sentence of the District Court of Florida, be quashed, and Petitioner further prays for such other and further general relief as may be meet and proper.

Respectfully submitted,

S. GUNTER TONEY
212 East Jefferson Street
Tallahassee, Florida
Attorney for Petitioner.

CERTIFICATE OF SERVICE.

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable Clinton N. Ashmore, United States Attorney, Tallahassee, Florida, and a copy to Solicitor General, Department of Justice, Washington 25, D. C. on this 15th day of January, 1964.

S. GUNTER TONEY